Public Prosecutor v Ahmad bin Ibrahim

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–106 OF 2006
SU GEOK YIAM J
29 JUNE 2011

Criminal Law — Dangerous Drugs Act 1952 — s 39B — Trafficking — Trafficking of 854.2g cannabis — Drugs easily visible in bag held by accused — Accused looking frightened, putting up struggle and attempting to run away — Whether court could draw irresistible inference in relation to accused's custody, control and knowledge of drugs — Whether presence of drugs in accused's urine relevant evidence — Whether presumption in s 37(da) of the Dangerous Drugs Act 1952 arose — Defence of innocent carrier — Whether presumption of trafficking rebutted

Evidence — Relevancy — Evidence relating to facts in issue — Relevancy of facts forming part of same transaction — Whether conduct of accused in attempting to escape admissible to show culpability — Whether presence of drugs in accused's urine relevant and admissible — Res gestae — Evidence Act 1950 ss 5, 6 & 8

The accused was charged with the offence of trafficking in 854.2g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 (the 'DDA') and punishable under s 39B(2) of the DDA. The charge alleged that he committed the offence in front of a shop house in Bukit Kemuning, Klang. According to the prosecution, a team of police officers led by PW3 had laid an ambush in front of the shop house. PW3 saw the accused coming down the staircase of the shop house and standing on the five foot way. The accused was holding a bag in his right hand and was behaving suspiciously. When PW3 and his men approached the accused and introduced himself to the accused as a police officer, the accused attempted to run away. The accused was arrested and PW3 seized the bag from the accused's right hand. The bag which could be easily opened was found to contain a slab of dried plant material wrapped in transparent plastic. The accused looked frightened and struggled vigorously to set himself free. The defence claimed that the accused was an innocent carrier of the bag for one Iskandar to whom the cannabis actually belonged and that the accused had only momentary custody and control of the bag without knowledge that the bag contained cannabis.

Held, finding the accused guilty as charged and sentencing him to death:

(1) The prosecution had sufficiently proven the two elements necessary to

establish that the accused had mens rea possession of the cannabis inside the bag, to wit, the physical element and the mental element. The physical element of custody and control was proved as the cannabis was found in the physical possession of the accused as he was arrested holding the bag in his right hand. The mental element was also proved as the accused was behaving suspiciously before he was arrested, had put up a struggle with PW3 and tried to run away when PW3 identified himself to the accused as a police officer. The accused also appeared frightened and put up a vigorous struggle to free himself when PW3's search of the bag revealed the drugs. From the accused's conduct the court could infer that he had knowledge of the cannabis in the bag which was recovered from his right hand (see para 16(e)–(g)).

(2) Since the amount of the cannabis in his possession was in excess of the weight of cannabis prescribed in s 37(da) of the DDA, to wit, 200g, the accused was presumed to be trafficking in the cannabis unless he was able to prove to the contrary on the balance of probabilities (see para 16(h)).

(3) The science officer's evidence concerning the presence of drugs in the accused's urine was relevant and admissible pursuant to s 5 of the Evidence Act 1950 read together with ss 6 and 8 of the same Act. This evidence gave rise to a reasonable inference that the accused had consumed cannabis shortly before his arrest and this prior conduct of the accused in consuming cannabis formed part of the res gestae of the commission by the accused of the offence of trafficking on the date and at the time stated in the charge since it was so closely connected by proximity of time, proximity of place, and continuity of action and community of purpose or decision. It is not unusual for consumers of dangerous drugs to also peddle the dangerous drugs in order to pay for the cost of the dangerous drugs which they consume; *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 referred (see paras 42–43).

(4) Based on the totality of the evidence led by the prosecution the court was able to draw an irresistible inference that the accused not only knew about cannabis and had consumed cannabis before the material time but that he also had custody, control and knowledge of the cannabis inside the bag at the material time (see para 45).

(5) The accused's defence that he had no knowledge of the slab of cannabis inside the bag was most unreasonable, highly improbable and unlikely bearing in mind that he was not a stranger to cannabis as his urine test showed. Further, the accused had failed to rebut the other independent evidence from which the court had inferred knowledge on his part concerning the cannabis inside the bag. The defence had failed to rebut the presumption of trafficking on a balance of probabilities (see paras 38, 67).

[Bahasa Malaysia summary

Tertuduh didakwa dengan kesalahan mengedar 854.2g ganja di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan dihukum di bawah s 39B(2) ADB. Pertuduhan tersebut mendakwa bahawa dia melakukan kesalahan tersebut di hadapan rumah kedai di Bukit Kemuning, Klang. Menurut pendakwa raya, sekumpulan pegawai polis diketuai oleh SP3 telah merancang serangan di hadapan rumah kedai. SP3 nampak tertuduh menuruni anak tangga rumah kedai tersebut dan berdiri di kaki lima. Tertuduh memegang beg di tangan kanannya dan berkelakuan mencurigakan. Apabila SP3 dan anggota-anggotanya mendekati tertuduh dan mengenalkan dirinya kepada tertuduh sebagai seorang pegawai polis, tertuduh cuba untuk melarikan diri. Tertuduh ditangkap dan SP3 merampas beg daripada tangan kanan tertuduh. Beg yang boleh dibuka dengan mudah tersebut didapati mengandungi satu kepingan bahan tumbuhan kering yang dibungkus dalam plastik lutsinar. Tertuduh tampak ketakutan dan bersungguh-sungguh bergelut untuk melepaskan diri. Pembelaan mendakwa bahawa tertuduh merupakan pembawa tidak bersalah untuk seseorang bernama Iskandar di mana ganja tersebut adalah kepunyaannya dan bahawa tertuduh hanya mempunyai jagaan dan kawalan sementara beg tersebut tanpa mengetahui bahawa beg tersebut mengandungi ganja.

Diputuskan, mendapati tertuduh bersalah seperti dipertuduh dan menjatuhkan hukuman mati ke atasnya:

(1) Pendakwa raya telah membuktikan secukupnya dua elemen penting untuk menunjukkan bahawa tertuduh mempunyai milikan mens rea ganja di dalam beg, iaitu, elemen fizikal dan mental. Elemen fizikal jagaan dan milikan dibuktikan apabila ganja ditemui dalam milikan fizikal tertuduh apabila dia ditangkap memegang beg di tangan kanannya. Elemen mental juga dibuktikan apabila tertuduh berkelakuan mencurigakan sebelum dia ditangkap, bergelut dengan SP3 dan cuba melarikan diri apabila SP3 mengenalkan dirinya sebagai seorang pegawai polis. Tertuduh juga nampak ketakutan dan bersungguh-sungguh bergelut bagi membebaskan dirinya apabila carian SP3 terhadap beg tersebut mendedahkan dadah tersebut. Daripada tindakan tertuduh, mahkamah boleh mengandaikan bahawa dia tahu mengenai ganja di dalam beg yang diambil daripada tangan kanannya (lihat perenggan 16(e)–(g)).

(2) Memandangkan jumlah ganja di dalam milikannya adalah melebihi berat dadah yang ditetapkan dalam s 37(da) ADB, iaitu, 200g, tertuduh dianggap mengedar ganja melainkan dia boleh membuktikan sebaliknya atas imbangan kebarangkalian (lihat perenggan 16(h)).

(3) Keterangan pegawai sains berhubung kehadiran dadah dalam air kencing tertuduh adalah relevan dan boleh diterima menurut s 5 Akta Keterangan

A 1950 dibaca bersama dengan ss 6 dan 8 Akta yang sama. Keterangan ini menimbulkan anggapan munasabah bahawa tertuduh telah menggunakan ganja tersebut sejurus sebelum tangkapannya dan tindakan tertuduh sebelum ini yang menggunakan ganja membentuk sebahagian perlakuan *res gestae* tertuduh menjalankan kesalahan B mengedar pada tarikh dan pada masa yang ditetapkan dalam pertuduhan memandangkan ia berkait rapat dengan kedekatan masa, tempat dan kesinambungan tindakan dan tujuan komuniti atau keputusan. Adalah tidak menghairankan bagi pengguna dadah berbahaya untuk menjajakan dadah berbahaya tersebut untuk membayar kos dadah berbahaya yang C digunakan; *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 dirujuk (lihat perenggan 42 & 43).

(4) Berdasarkan keterangan secara keseluruhan yang dikemukakan oleh pendakwaraya, mahkamah dapat membuat satu anggapan bahawa tertuduh tidak hanya mengetahui mengenai ganja dan menggunakan D ganja sebelum masa material tetapi dia juga mempunyai jagaan, milikan dan pengetahuan mengenai ganja di dalam beg pada masa material (lihat perenggan 45).

(5) Pembelaan tertuduh bahawa dia tidak tahu mengenai papak ganja di E dalam beg adalah sangat tidak munasabah, tidak mungkin dan diragukan apabila difikirkan bahawa dia bukannya asing kepada ganja seperti yang ditunjukkan oleh ujian air kencingnya. Seterusnya, tertuduh gagal untuk mematahkan keterangan bebas lain yang digunakan mahkamah untuk membuat anggapan pengetahuan bagi pihaknya berhubung ganja dalam F beg. Pembelaan gagal untuk mematahkan anggapan pengedaran atas imbangan kebarangkalian (lihat perenggan 38 & 67).]

Notes

For a case on s 39B, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) para 696.
G For cases on evidence relating to facts in issue, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2602–2605.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, FC (refd)
H *Chan Pean Leon v PP* [1956] MLJ 237 (refd)
Chua Beow Huat v PP [1970] 2 MLJ 29 (refd)
Leow Nghee Lim v Reg [1956] MLJ 28 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Mat v PP [1963] MLJ 263 (refd)
I *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169, SC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)

PP v Jazri bin Johari [2011] MLJU 63, HC (refd)
PP v Denish a/ Madhavan (Rayuan Jenayah No 05–72 Tahun 2005(J) (refd)
PP lwn Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
PP v Ouseng Sama-Ae [2008] 1 CLJ 337, CA (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Teng Howe Sing v PP [2009] 3 MLJ 46, FC (refd)
Toh Ah Loh and Mak Thim v Rex [1949] MLJ 54 (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)
Zulfikar bin Mustaffah v PP [2001] 1 SLR 633, CA (refd)

Legislation referred to

Criminal Procedure Code ss 180, 182A
Dangerous Drugs Act 1952 ss 2, 6, 15, 37(d), 37(da), 37(da)(iiia), 39A(2), 39B, 39B(1)(a), (2)
Evidence Act 1950 ss 5, 6, 8

Siti Rafidah Bt Zainuddin (Deputy Public Prosecutor) for the prosecutor.
Zainal Ithnin (Zainal Ithnin & Partners) for the accused.

Su Geok Yiam J:

[1] The accused, an Indonesian national, was charged with the offence of trafficking in 854.2g of cannabis ('the cannabis'), a dangerous drug, under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and punishable under s 39B(2) of the DDA.

[2] The charge against him alleged that he had committed the offence on 9 February 2005 at about 8pm ('the material time') in front of a shop house ('the shop house') at the 7 1/2 milestone, Bukit Kemuning in the Klang District in the State of Selangor ('the place of incident').

[3] The prosecution called six witnesses. They were as follows

(a) PW1, a government chemist, Puan Maimonah bt Sulaiman;

(b) PW2, the police photographer, police Corp Rosli bin Hasnan @ Piae;

(c) PW3, the leader of the police ambush party, ASP Ahmad Tarhidzi bin Omar;

(d) PW4, the keeper of the drugs exhibits store, police D/L/Corp Haris Fadilah bin Baki;

A (e) PW5, the science officer, Puan Noriha bt Sanusi; and

(f) PW6, the investigating officer ('the IO'), police C/Insp Mohamad Salim bin Gulam Muhammad.

B **[4]** The evidence which was adduced by the six witnesses was as follows.

[5] At about 7.40pm, on 9 February 2005, PW3, who was holding the rank of C/Insp at the material time, laid an ambush at the place of incident together with ten of his men. They were Sgt/Major Abu Hassan, Sgt Shamsul Kamar, C Sgt Mohtar, Corp Mat Hasnan, Corp Razali, Corp Rizal, Corp Razak, Corp Taufek, woman police constable Norsilah and L/Corp Mat Yatim.

[6] PW3 divided his men into groups. His group comprised himself and four of his men. They stationed themselves in front of the place of incident. He D observed the front of the shop house. At about 8pm he saw the accused coming down the staircase of the shop house. The accused then stood on the five foot way. He saw the accused holding something in his right hand. The accused was behaving suspiciously. The accused was alone. He and his men then approached the accused. He introduced himself to the accused as a police E officer. The accused attempted to run away.

[7] PW3 and his men succeeded in arresting the accused who was still holding the bag in his right hand. PW3 seized the bag from the accused's right hand. It was a yellow coloured plastic bag bearing the printed words 'THE F GRAND SALE' ('the bag'), P10. The court noted that the physical condition of the bag showed that it could be easily opened in order to discover its contents. PW3 opened the bag and saw a slab of dried plant material. It was wrapped in transparent plastic and tied with a string. He suspected the slab of dried plant material to be a dangerous drug to, wit, *ganja*.

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[8] PW3 looked at the accused. The accused look frightened and struggled vigorously with PW3's men in order to set him self free. But PW3's men held tightly on to the accused.

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[9] PW3 then searched the body of the accused. He found a bunch of keys in the accused's right trousers' pocket.

[10] He next questioned the accused. The accused told him his name was I Ahmad bin Ibrahim and that he lived on the first floor of the shop house.

[11] The accused then led PW3 upstairs to the first floor of the shop house where PW3 made several arrests but he could not remember the names of the persons whom he had arrested.

[12] He brought the accused and the bag together with its contents to the Shah Alam District Police Narcotics office where he lodged a police report in connection with the accused's arrest. He identified Sek 15 Report No 002282/05, as the police report, P13, which he had lodged at 10pm that night. He handed over the report, the accused and the slab of dried plant material to PW6, the IO.

[13] The IO, subsequently, sent the slab of dried plant material to the chemist, PW1, for analysis.

[14] The court was satisfied that the slab of dried plant material which was analysed by the chemist was the same slab of dried plant material which was seized by PW3 from the accused at the material time as there was no break in the chain of evidence concerning its handling from the time of its seizure until the time it was tendered, identified by PW3 (based on his markings), the IO and also by the chemist and the balance of the slab of dried plant material after the analysis by the chemist was produced in court and marked as a prosecution exhibit.

[15] PW1, the government chemist, had examined and analysed the slab of dried plant material which she received from the IO on 7 April 2005. She found that it was 854.2g of cannabis, a type of dangerous drug, as defined in s 2 of the DDA.

[16] At the close of the prosecution case the court was satisfied that the prosecution had succeeded in establishing a prima facie case that the accused was trafficking in the cannabis at the material time because of the following reasons:

(a) the court found the evidence of the six prosecution witnesses to be credible, consistent and reliable;

(b) the court also found them to be truthful witnesses;

(c) the chemist had confirmed that the slab of dried plant material is cannabis, a dangerous drug, as defined in s 2 of the DDA;

(d) the chemist and the complainant had sufficiently identified the balance of the cannabis produced in court as originating from the slab of dried plant material;

(e) the prosecution had sufficiently proven the two elements necessary to establish that the accused had mens rea possession of the cannabis inside the bag, to wit, the physical element and the mental element;

A (f) the physical element of custody and control was proved as the cannabis was found in the physical possession of the accused as he was arrested holding the bag in his right hand;

(g) the mental element was also proved as the accused was behaving
B suspiciously before he was arrested, had put up a struggle with PW3 and tried to run away when PW3 identified himself to the accused as a police officer appeared frightened when PW3's search of the bag, which the accused was holding in his right hand, revealed the slab of dried plant material wrapped in transparent plastic, which PW3 suspected to be
C ganja, and, also, the accused had put up a vigorous struggle in order to free him self after PW3 saw the slab of dried plant material in the bag and from the accused's conduct the court could and did infer that he had knowledge of the cannabis in the bag which was recovered from his right hand;

D (h) since the amount of the cannabis in his possession was in excess of the weight of cannabis prescribed in 37(da) of the DDA, to wit, 200g, the accused was presumed to be trafficking in the cannabis unless he was able to prove to the contrary on the balance of probabilities; and

E (i) should the accused elect to remain silent after his defence was called, the court was prepared to find him guilty, convict him and impose on him the mandatory death penalty as provided in s 39B(2) of the DDA.

F THE LAW

[17] Before ruling that the prosecution had succeeded in establishing a prima facie case against the accused as per the charge against him, the court
G considered and applied s 180 of the Criminal Procedure Code ('the CPC') which sets out clearly the procedure to be followed by the court upon the conclusion of the prosecution case and also the relevant principles of law relating to the meaning of a prima facie case and the meaning of possession as enunciated and applied by the superior courts which have been endorsed,
H applied and followed by the Court of Appeal and the apex court.

SECTION 180 OF THE CPC

[18] Section 180 of the CPC provides as follows:

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180 Procedure after conclusion of case for prosecution

(1) When the case for the Prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused.

(2) …

(3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

MEANING OF 'A PRIMA FACIE CASE'

[19] Now, what is the meaning of 'a prima facie case'?.

[20] In the case of *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 Augustine Paul J (as His Lordship then was) described 'a prima facie case' as follows at p 63:

> A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be post poned to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.

[21] In the Federal Court case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, Augustine Paul FCJ reiterated the meaning of 'a prima facie case'. He said as follows at p 315E:

> A 'prima facie case' is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence must be such that it can be overthrown only by evidence in rebuttal. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* (11th Ed), as:
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> > A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
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> … In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

[22] In determining whether a prima facie case has been made out at the end of the prosecution case, the Federal Court consisting of Their Lordships Ahmad Fairuz PCA (as he then was), Abdul Malek Ahmad FCJ (as he then was)

and Gopal Sri Ram JCA (as he then was) had, in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 noted that the judgment in the case of *Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 63 was scrutinised both by the Court of Appeal and the Federal Court (see the two judgments in [2000] 2 MLJ 486 and [2002] 3 MLJ 193). The Federal Court also noted that the Court of Appeal in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 expressly approved and preferred the test in that case. The Federal Court then affirmed the test which was formulated by the Court of Appeal in the case of *Looi Kow Chai & Anor v Public Prosecutor*. Gopal Sri Ram JCA who delivered the judgment of the Federal Court summarised the steps to be undertaken by a trial court at the close of the prosecution case. He said as follows at p 400 B–F:

> (i) at the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from the evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
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> (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then a prima facie case has not been made out and the accused should be acquitted;

MEANING OF 'POSSESSION'

[23] The court shall now deal with the meaning of 'possession'.

[24] In *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54, Gordon Smith Acting CJ defined 'possession' as follows:

> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, and must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing.

[25] In *Leow Nghee Lim v Reg* [1956] MLJ 28, Taylor J at p 32 said this:

> The word 'possession' is a vague and general word which cannot be closely defined. Without a least general knowledge, there cannot be possession but there can be possession without full and exact knowledge. This is recognised in the present Drugs Ordinance which provides, by the presumption already cited, that if a man has custody or control of a drug, the onus of proving, first that he did not have possession, and secondly that he did not know the nature of the drug, shall be shifted to him.

[26] In *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237, at p 239, Thomson J (as he then was) had this to say about possession:

> 'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed), at p 304:
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> > A moveable thing is said to be in the possession of a person when he is so situated with respect to if that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
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> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi.

[27] In *Public Prosecutor v Parlan bin Dadeh* [2008] 6 MLJ 19, Augustine Paul FCJ, in his judgment which received the concurrence of Zaki bin Tun Azmi PCA (as His Lordship then was) and Nik Hashim bin Nik Ab Rahman FCJ held that the reaction of the accused in looking stunned or shocked upon being approached by the police was clearly admissible under s 8 of the Evidence Act 1950. It showed that he had mens rea possession of the cannabis since it had a direct bearing on the fact in issue as the drugs found were tucked away in front of the jeans worn by him. The learned judge further held as follows:

> The explanation for his reaction must therefore be offered himself as required by s 9. The court cannot, on its own, offer an explanation for his reaction.

[28] In the case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1, the High Court found the respondent guilty and convicted him for an offence of trafficking in 4,826.9g of cannabis under s 39B(1)(a) of the DDA. He was sentenced to death by the High Court. On his appeal to the Court of Appeal, his conviction and sentence were set aside and substituted with a conviction for an offence under s 6, punishable under s 39A(2) of the DDA. The respondent was sentenced to 18 years imprisonment and ten strokes. The public prosecutor appealed to the Federal Court against the decision of the Court of Appeal. The appellant contended that independent of the presumption under s 37(d) of the DDA, there was ample evidence for the court to draw an inference that the respondent knew what were the contents of the three packages.

[29] In the case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ

A 1, Ariffin Zakaria FCJ (as His Lordship then was) in delivering the judgment of the Federal Court said as follows on the issue of possession at p 8G–I:

> [16] it is trite that what constitutes 'possession' under s 37 of the Act is a question of law (see *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120 and Public Prosecutor v Badrulsham bin Baharom [1988] 2 MLJ 585). It is however a question of fact whether in a given case a person can be said to be in possession of something…
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> [17] Therefore, the presence of the three packages in the car without a plausible explanation from the respondent could give rise to a strong inference that he had knowledge that the packages contained drug or things of similar nature (see also *Lim Beng Soon v Public Prosecutor* [2000] 4 SLR 589). We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge. In this regard it is pertinent to refer to the observation of the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633, at p 639:
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> > 21 For the element of 'possession (within the meaning of s 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v Metropolitan Police Commissioner* [1962] 2 AC 256; *Tan Ah tee & Anor v Public Prosecutor* [1978-1979] SLR 211; [1980] 1 MLJ 49. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspaper and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
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> > 22 We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrapping. *Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible.* As Yong Pung How CJ remarked in *Public Prosecutor v Hla Win* [1995] 2 SLR 424 (at p 438):
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> > In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses. (Emphasis added.)

[30] At p 10 B–I, the learned judge said as follows on the issue of knowledge necessary to establish possession:

> [19] The issue of knowledge necessary to establish possession came to be considered by the English House of Lords in the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, which was considered and relied upon by the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor*. In Warner the following question was posed to Their Lordships:
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> > Whether for the purpose of s 1 of the Drugs (Prevention of Misuse) Act 1964, a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature.
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> [20] At p 367 Lord Reid addressed the issue as follows:
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> > The object of this legislation is to penalise possession of certain drugs. So if mens rea has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result.
>
> [21] In the same case Lord Morris answered the question in following manner:
>
> > If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them.

A PRESUMPTION OF 'TRAFFICKING' UNDER S 37 (DA) OF THE DDA

[31] It is trite law that without the requisite mens rea possession or animus possidendi of the drugs, the presumption of trafficking in the drugs as provided for in s 37(da)(iiia) of the DDA could not be triggered off. In the case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, Chong Siew Fai CJ (Sabah and Sarawak) who delivered the judgment of the Federal Court said as follows at p 289:

> to arrive at the presumption of 'trafficking' under s 37 (da), a finding of being 'in possession' of drug is necessary (in addition, of course to proof of the relevant minimum quantity specified).

[32] Further down the page at para B–C the learned judge said as follows:

> In our view to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, … *there must be an express affirmative finding (as opposed to legal presumption) of possession* as understood in criminal law, based on evidence. (Emphasis added.)

[33] Further at p 290 F–H, the learned judge said as follows:

> … to invoke the presumption of trafficking, the element of possession … must first be proved or found … for the purpose of the present issue in question, there is, in our opinion, no material difference between the words 'proved to have had in … possession' and the words 'found in possession' used in the respective sections of the two Acts. Both necessitate a finding or proof of possession beyond reasonable doubt based on evidence. Both necessitate *a finding or proof of possession beyond reasonable doubt based on evidence.* (Emphasis added.)

MEANING OF 'TRAFFICKING' IN S 2 OF THE DDA

[34] Section 2 of the DDA defines the word 'trafficking' to include:

> the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, *carrying*, sending, delivering, procuring, supplying or distributing any dangerous drug otherwisethan under the authority of this Act or the regulations made under the Act. (Emphasis added)

[35] Reverting back to the instant case, there was an attempt by the defence to raise a reasonable doubt in the prosecution case, during the prosecution case itself, that the accused was an innocent carrier of the bag containing the cannabis for one Iskandar to whom the cannabis actually belonged and that the

accused had only momentary custody and control of the bag without knowledge that the bag contained cannabis.

[36] Learned defence counsel had suggested to PW3 that one day before the day of the police ambush and the accused's arrest, PW3 had met up with a person by the name of Iskandar in order to purchase cannabis from him. It was agreed between PW3 and Iskandar that the cannabis would be delivered on the following day, to wit, at 9 February 2005, which was the date stated in the charge.

[37] It was also suggested to PW3 that on 9 February 2005, PW3 and woman police constable Norsilah had approached the accused while he was standing on the five foot way with the bag. PW3 had handcuffed the hands of the accused only after the accused had handed over the bag to PW3. However, all these suggestions were denied by PW3.

[38] In addition to the evidence which was adduced by PW3 concerning the conduct of the accused and the surrounding circumstances at the material time in order to enable the court to infer that the accused had the requisite knowledge of the cannabis in the bag, the prosecution also called PW5, the science officer, who had analysed a sample of the accused's urine to show that the accused was no stranger to cannabis.

[39] She is the holder of a bachelor of science degree in bio-chemistry from the Universiti Kebangsaan Malaysia. At the time of her testimony she already had seven years of experience in analysing urine samples for dangerous drugs upon the requests of the police. She had also attended courses on the analysis of dangerous drugs in urine samples. She had given evidence as an expert witness in the Petaling Jaya Sessions Court and to her knowledge her evidence had been accepted by the court.

[40] PW5 testified that she was asked to analyse a sample of the accused's urine which she received from D/Corp Mohd Pisol bin Che Kar who was one of the 13 witnesses who were offered to the defence at the close of the prosecution case.

[41] She carried out the analysis and found that it contained 11-nor delta - 9 - tetrahydrocannabinol - 9 - carboxylic acid, a type of molecule, which is always present in the urine of a person who has taken *ganja*.

[42] The court was of the view that her evidence concerning the presence of 11 – nor delta – 9 – tetrahydrocannabinol – 9 – carboxylic acid in the accused's urine was relevant and admissible pursuant to s 5 of the Evidence Act 1950 read together with ss 6 and 8 of the same Act. The reason is that by virtue of those

two sections evidence may be given to prove the existence of every fact in issue or of such other collateral facts which are declared relevant. The facts made relevant under s 8 include conduct of the accused antecedent to the commission of the offence with which he is charged and also the conduct of the accused at the time of the commission of the offence.

[43] The court was also of the view that PW5's evidence gave rise to a reasonable inference that the accused had consumed cannabis shortly before his arrest and this prior conduct of the accused in consuming cannabis formed part of the res gestae of the commission by the accused of the offence of trafficking on the date and at the time stated in the charge since it was so closely connected by proximity of time, proximity of place, and continuity of action and community of purpose or decision. It is not unusual for consumers of dangerous drugs to also peddle the dangerous drugs in order to pay for the cost of the dangerous drugs which they consume.

[44] The following passages taken from pp 121–122 of the book by Sarkar on *The law of Evidence*, (14th Ed), 1993, Vol 1 explain this principle of law succinctly:

> Facts Not in Issue Connected With a Fact in Issue. This section [s 6] and ss 7, 8, 9 deal with the relevancy of facts, ie, the fact in issue (ante s 3, 'Facts in issue and relevancy'). They describe the various ways in which facts though not in issue are so related to each other as to form components of the principal fact. There are facts which are so closely or inseparably connected with the fact in issue that they may be said to form part of the same transaction. A transaction may constitute a single incident occupying a few moments or it may be spread over a variety of acts, declarations, & c, occupying a much longer time and occurring on different occasions. They may also occur at the same place or at different places. All these constituent incidents, which though not strictly constituting a fact in issue, accompany and tend to explain or qualify the fact in issue. They form a chain as it were encircling the fact in issue. All these facts are relevant to the fact in issue and therefore admissible in evidence. They are evidentiary facts which render the existence or non-existence of a fact in issue highly probable. It is important to bear in mind that what is admissible under s 6 are facts which are connected with the fact in issue as 'part of the transaction' under investigation. In order that different acts may constitute the same transaction they must be connected by proximity of time, unity or proximity of place, continuity of action and community of purpose or design (see *Amirtalal v R*, 42C 957). Whether the connection is sufficient to make a fact or facts part of the transaction or is too remote must always depend on the circumstances of each case.
>
> The rule formulated in s 6 is expounded and illustrated in ss 7, 8, 9, and they should be read together. Relevancy has been described in ss 6-11 and Stephen says that ss 6-11 'are by far the most important and original part of the Act as they affirm positively what facts may be proved, whereas the English law assumes this to be known, and merely declares negatively that certain facts shall not be proved'.

> There are many incidents, however, which, though not strictly constituting a fact in issue, may yet be regarded as forming a part of it, in the sense that they closely accompany and explain that fact. In testifying to the matters in issue, therefore, witnesses must state them not in their barest possible form, but with a reasonable fitness of detail and circumstance. These constituents or accompanying incidents are said to be admissible as forming part of the res gestae.
>
> …
>
> Facts which may be proved, as part of res gestae, must be facts other than those in issue. These facts must form part of that very transaction and be thus connected with the facts in issue (*Thakkar Dass v State of HP* 1992 Cal LJ 2415, 2418; (HP)).

[45] Based on the totality of the evidence led by the prosecution the court was able to draw an irresistible inference that the accused not only knew about cannabis and had consumed cannabis before the material time but that he also had custody, control and knowledge of the cannabis inside the bag at the material time (see also the case of *Pendakwa Raya lwn Denish a/ Madhavan* (Rayuan Jenayah No 05–72 Tahun 2005(J)).

[46] The court also considered but rejected the accused's submission made on his behalf by his learned counsel that he had neither control nor knowledge of the cannabis in the bag because none of the prosecution witnesses saw the accused opening the bag and looking at the contents of the bag and, additionally, the bag containing the cannabis was given to him by one Iskandar to be handed over to PW3 and woman police constable L/Corp Norzilah.

[47] The reason is because the court was of the view that it was for the accused himself to give his explanation concerning his lack of knowledge and his behaviour at the time of his arrest to the court in the event that the court should call for his defence at the conclusion of the prosecution case (see the cases of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 and *Pendakwa Raya lwn Abdul Rahman Akif* [2007] 5 MLJ 1 which have been cited earlier on in this judgment). The court was of this view even though the IO, did say that Iskandar bin Jufri was among the 13 persons including the accused who were arrested by PW3 from the first floor of the shophouse where the accused said he was staying together with the 14 persons.

[48] It is trite law that since it is impossible to adduce direct evidence to show that the accused had knowledge of the cannabis inside the bag the court could infer guilty knowledge on the part of the accused from proved facts based on circumstantial evidence, to wit, the evidence of circumstances surrounding the recovery of the bag containing the slab of cannabis from the accused's right hand at the material time and the conduct of the accused when confronted by PW3 (see the case of *Public Prosecutor lwn Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193).

[49] It is also trite law that the evidence of the conduct of the accused when he was confronted and arrested by PW3 is clearly admissible by virtue of s 8 of the Evidence Act 1950 (see the case of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19).

[50] In the case of *Public Prosecutor v Ouseng Sama-Ae* [2011] 4 MLJ 756; [2008] 1 CLJ 337, Gopal Sri Ram JCA (as His Lordship then was) said that the mental ingredient of mens rea possession in a drug trafficking charge can be inferred from the proved and admitted facts of each case. In paras [3]–[4] at pp 342–343, His Lordship said as follows:

> [3] Now, in order to establish a prima facie case against the accused by reliance on the presumption under s 37(da) of the Act, the prosecution had to prove: (i) that the accused was in actual physical possession of the drug in question; and (ii) that the accused at the material time had knowledge of the drug found to be in his possession, that is to say that he had 'mens rea possession': See *Public Prosecutor v Badrulsham bin Baharom* [1987] 1 LNS 72. The first element was easily established here because the accused did have custody and control of the bag. Indeed, it is quite clear from the evidence that he was exercising dominion over exh P18 at all material times. The only question is whether he had mens rea possession. Like any other mental ingredient in an offence, this is to be inferred from the proved and admitted facts of each case.
>
> [4] As Lord Diplock said in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64: Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, *the purpose with which he did an act is a matter of inference from what he did.* Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Drugs Act.
>
> As a matter of common sense the larger the quantity od drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. (Emphasis added.)

[51] In the instant case, the IO has also testified that Iskandar bin Jufri was also charged under s 39B of the DDA in respect of a slab of dried plant material having a gross weight of 230g. Two others, namely, Mohd Dahalan and Shamsul, were also charged in court in respect of another type of dangerous drug, namely *syabu* which was recovered from them.

[52] So the defence has contended that there was a possibility that the slab of cannabis which was sent to the chemist in the instant case was not the one which was recovered from the accused. However the court noted, considered and accepted the denial by the IO that there could have been a mix up between the slab of cannabis which PW3 had recovered from the accused and the slab of cannabis which PW3 had recovered from Iskandar, Mohd Dahalan dan Shamsul. The IO had explained that there could not possibly have been a mix up because the type of dangerous drug which was recovered from Mohd Dahalan and Shamsul was clearly different from that which was recovered from the accused.

[53] Over and above that the slab of dried plant material which PW3 had recovered from the accused had a gross weight of 893g whereas the slab of dried plant material which was recovered from Iskandar bin Jufri only had a gross weight of 230g. This weight is only 1/2 of the weight of the slab of dried plant material which PW3 had recovered from the accused.

[54] The court found the IO's explanation reasonable and accepted it, accordingly. The court was also satisfied that the failure of PW3 to recall or remember that he had arrested 13 others including Iskandar bin Jufri, Mohd Dahalan and Shamsul from the first floor of the shop house did not render him an untruthful and an unreliable witness. The reason is because the incident took place about three years and seven months prior to the date when he testified before the court. The court was of the view that his memory for names was not good but that fact alone did not make him a dishonest and an unreliable witness or the whole of his testimony untruthful and unreliable.

[55] As far as the court was concerned what was more important was that he remembered the important and relevant details concerning the accused's arrest and the recovery of the cannabis from the accused. He had weighed the cannabis using his digital balance which was not calibrated and had found that the gross weight was 89g. This weight was four times the weight of the cannabis which he had recovered from Iskandar bin Jufri. So it was highly improbable and unlikely that he could have mixed up the two slabs of cannabis when he handed them over to the IO, together with the 13 other arrestees.

[56] It was the accused's submission that he did not put up a struggle when PW3 arrested him because he did not know that the bag contained cannabis and that he merely approached PW3 and woman police constable Norsilah to hand over the bag as he was previously instructed to do that by Iskandar. However, the court rejected the accused's submission because the court believed the testimony of PW3 which was credible and reliable and as stated earlier the court was of the view that it could only determine the credibility and

reliability of the accused's defence if the accused himself gave the explanation to the court (see s 8 of the Evidence Act 1950 and the case of *Parlan bin Dadeh v Public Prosecutor*).

[57] The defence had also challenged the reliability of the analysis which was carried out by PW1, the government chemist, on the ground that the amounts of the samples which she had taken for her analysis were insufficient. There was also a break in the chain of evidence concerning the handling of the cannabis because PW1's assistant whom she said had assisted her in carrying out the various tests during her analysis of the suspected drug exhibit was not called to testify to that effect.

[58] Nevertheless, the court disagreed with and rejected the contentions of the defence. The reasons are as follows.

[59] Firstly, the DDA did not specify any minimum amount in respect of the samples taken by a government chemist for purposes of analysis. So it was a matter which was left entirely to the discretion of PW1 to be exercised in accordance with her professional training and expertise. Secondly, the court was satisfied that PW1 was a qualified government chemist who was competent to analyse the incriminating exhibit and to testify in court in order to state her findings and the manner in which she had performed her analysis. She had testified that she had conformed to the international standards of testing as set by the UNODC.

[60] The court had no reason to disbelieve her or to reject her testimony. So the court accepted her testimony (see the case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492). It was left to the defence, in the event the defence was called for by the court at the conclusion of the prosecution case, to call its own expert in order to adduce a contrary view and to persuade the court to believe or accept that view.

[61] She also said that she had never left the suspected drug exhibits alone with her assistant at any time. So the court was satisfied that the defence contention that there was a break in the chain of the evidence relating to her handling of the drug exhibit clearly had no merits and was rejected by the court.

[62] The court was further of the view that the non-calling of woman police constable Norsilah was not fatal to the prosecution case because she was not a material witness to the unfolding of the narrative of the case for the prosecution. PW3 was the material witness.

[63] Therefore, the failure of the prosecution to call woman police constable

Norsilah as a witness did not create a gap in the prosecution case. Furthermore, she was among the 13 witnesses who were offered to the defence. So the prosecution had sufficiently discharged its duty by making her available to the defence if the defence was called and the defence wished to call her as a defence witness.

THE ACCUSED'S DEFENCE

[64] In order to be acquitted and discharged the accused had to rebut the presumption of trafficking on the balance of probabilities (see *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 and *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169).

[65] After the three options were duly explained and understood by the accused, the accused elected to make his defence by giving evidence on oath.

[66] He called one witness, namely, himself, as SD1.

[67] Having heard his defence and considered the totality of the evidence at the end of the defence case which included the prosecution case and the submissions of both the parties the court was satisfied that the defence had failed to rebut the presumption of trafficking on a balance of probabilities.

[68] The court was satisfied that the prosecution had proven the charge against the accused beyond all reasonable doubt pursuant to s 182A of the CPC.

SECTION 182A OF THE CPC

[69] Section 182A of the CPC provides as follows:

> Procedure at the conclusion of the trial
>
> 82A
>
> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) It the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[70] In the classic case of *Mat v Public Prosecutor* [1963] MLJ 263, concerning the meaning of the burden of proof by the accused in cases where it is necessary for him to rebut the prosecution case against him Suffian J (as he then was) held, inter alia, that if the court accepts or believes the accused's explanation then the court must acquit and discharge the accused. At pp 263I–264A–D His Lordship said as follows:

> The correct law for magistrates to apply is as follows. If you accept the explanation given by or on behalf of the accused, you must of course acquit. But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.
>
> The position may be conveniently stated as follows:

(a) If you are satisfied beyond reasonable doubt as to the accused's guilt …	Convict.
(b) If you accept or believe the accused's explaination	Acquit.
(c) If you do not accept or believe the accused's explanation …	Do not convict but consider the next steps below.
d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt …	Convict.
(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt …	Acquit.

[71] The above statement of the law to be applied by magistrates is also applicable by High Court judges as well who sit alone without a jury. In the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar*, Gopal Sri Ram JCA said as follows at p 400F concerning the step to be taken by the trial court after defence is called and the accused elects to give evidence:

> (iv) after defence is called, the accused elects to give evidence then go through the steps set out in *Mat v Public Prosecutor* [1963] MLJ 263.

MEANING OF 'REASONABLE DOUBT'

[72] The meaning of the expression 'reasonable doubt' can be found in the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 where Sharma J said as follows at p 17I in the left hand column to A–B in the right hand column:

The following definition of 'reasonable doubt' is often quoted:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

It has again been said that the doubt which makes one hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there. Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

[73] The reasons why the court concluded in the instant case that the defence did not succeed in raising a reasonable doubt in the prosecution case are as follows.

[74] Firstly, although the court believed the accused when he said that one of the persons who stayed with him on the first floor of the shop house was Iskandar, the court found his story that just before his arrest it was Iskandar who had given the bag containing the slab of cannabis to the accused with the express instruction to hand it over to Iskandar's friend and that he had complied with Iskandar's instruction by taking the bag from Iskandar without knowing the nature of the contents of the bag and also without knowing the identity of Iskandar's friend to be most unreasonable, improbable and unlikely.

[75] The court was of the view that his defence that he had no knowledge of the slab of cannabis inside the bag to be most unreasonable, highly improbable and unlikely bearing in mind that he was not a stranger to cannabis as his urine test, as stated earlier was tested positive for 11 - nor delta - 9 - tetrahydrocannabinol - 9 - carboxylic acid, a type of molecule which is always present in the urine of a person who has taken *ganja*. From this proved fact alone, the court was able to draw the irresistible inference that the accused did know about the cannabis inside the bag.

[76] Even if the evidence as referred to above concerning the presence of a type of cannabis molecule in the accused's urine is completely disregarded, the court found that the accused had failed to rebut the other independent evidence from which the court had inferred knowledge on his part concerning the cannabis inside the bag. The accused could have easily opened the bag to

A check its contents. Had he done that he could have easily seen that it was a slab of cannabis as it was wrapped in transparent plastic.

[77] The explanation of the accused that he had struggled with PW3 because he was afraid as he did not possess a valid passport and that he had just entered
B the country a week before he was arrested by PW3 was also highly improbable and unlikely.

[78] The reasons are because firstly, the accused wanted the court to believe that he was a timid person. Yet he had not only the courage but also the
C audacity to enter this country illegally, without any passport. Secondly, he had chosen to reside in a somewhat busy place where he was likely to be seen by the locals, the police and other enforcement agencies. Thirdly, he had gone out of the shop house in order to deliver a bag with contents the nature of which he said he did not know.
D

[79] Fourthly, he was going to deliver them to someone whom he has alleged he also did not know just because he was asked to do so by Iskandar. Just because he was allowed by Iskandar to stay in the premises did not mean that he
E could just throw all caution to the wind and embark on a mission which could result in him committing a capital offence and in the event that he is charged he could just set up his defence of innocent carrier of the dangerous drugs.

[80] Fifthly, as he has chosen to come to this country he must be taken to
F know that this country has a tough law relating to the trafficking of dangerous drugs which makes it a capital offence, not unlike the law relating to the trafficking of dangerous drugs in his own mother land, to wit, Indonesia, and even if he did not know that it would not constitute a defence to the charge against him as ignorance of the law is no excuse.
G

[81] The finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

H **[82]** In the instant case, there was assent by the accused to the control of the bag. He had deliberately assumed control of the bag. Ordinarily it can be said that the accused was in possession of the bag. He also knew the bag had contents. So he was also in possession of the contents inside the bag (see *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 and *Zulfikar bin*
I *Mustaffah v Public Prosecutor* [2001] 1 SLR 633).

[83] The onus was on him to satisfy the court that he only had some momentary custody of the bag without any knowledge or means of knowledge of what the bag contains in order to rebut the element of knowledge which is

needed to negative mens rea possession and to prevent the triggering off of the presumption of trafficking in order to raise a doubt in the prosecution case (see the case of *Public Prosecutor v Jazri bin Johari* [2011] MLJU 63; (Shah Alam Criminal Trial No 45–62 of 2002)). He did try to do that by saying that he was arrested just one minute after Iskandar passed him the bag. But unfortunately for him based on the facts and circumstances in the instant case the court neither believed him nor found it to be probable or likely based on the reasons set out below.

[84] The proven facts showed that the accused had descended the staircase of the first floor and was standing on the five foot way with the bag in his right hand. Even assuming for a moment that it was true that Iskandar had given him the bag, he had willingly taken custody of the bag and he was in control of the bag at the material time. He also had ample opportunity to look into the bag before he made or continued his descent down the staircase. He chose not to do that. From his suspicious and guilty conduct and his failure to rebut the inference that was made by the court of his guilty knowledge of the cannabis inside the bag the court was satisfied beyond a reasonable doubt that he had mens rea possession of the cannabis.

[85] Furthermore, it was clear that after arresting the accused, PW3, went up to the first floor and arrested Iskandar and two others who were staying there. At this juncture, the accused also had the opportunity to inform PW3 that it was Iskandar who had asked him to deliver the bag to him so that PW3 could confront Iskandar there and then with the accused's story. But he chose not to do so for reasons best known to himself.

[86] The court is fully aware of the principle of law that there is no burden on the accused to prove his innocence. The court is also fully aware of the principle of law that the accused is presumed innocent until proven otherwise and that he has a right to remain silent upon his arrest and that no adverse inference can be drawn against him for exercising his right to remain silent. Nevertheless his conduct at the time of his arrest is relevant under s 8 of the Evidence Act 1950.

[87] The court was of the view that the accused's defence was not reasonable nor credible, not consistent with his innocence and was most probably concocted by the accused in order to extricate himself from the very serious charge that he was facing (see the cases of *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46 and *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29).

[88] The court was, therefore, satisfied that the accused's defence had failed to rebut the presumption of trafficking on a balance of probabilities.

[89] Apart from not believing the accused's story the court also considered the question whether at the close of the defence the court was left in a state of doubt whether the accused was guilty of the offence charged. The reason is because the accused was still entitled to be acquitted and discharged if at the close of the defence the court was left in a state of doubt whether the accused was guilty of the offence charged as it would mean that the prosecution had failed to prove the charge against the accused beyond all reasonable doubt (see *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16).

[90] Having considered carefully the defence the court had no doubt that the accused knew that the bag contained cannabis. The court also had no doubt that he was conveying the cannabis in the bag for the purpose of trafficking in the cannabis when he was arrested by PW3.

[91] Here the amount of the cannabis was big. It was about four times the amount to trigger off the presumption of trafficking in s 37(da) of the DDA. It was, therefore, reasonable for the court to draw an irresistible inference from the proved facts of the case that the cannabis could not be intended for his own consumption and to infer that he was trafficking in the cannabis at the material time because he was carrying the cannabis to another place ie from the first floor of the shop house to the five foot way in order to part with the possession of the cannabis to some other person whether known to him or a potential purchaser whom he hoped to find.

[92] In view of the circumstances of the instant case the court was satisfied that it was highly improbable and unlikely that although the accused had actual or physical possession of the cannabis ie custody and control of the bag containing the cannabis he did not have mens rea possession of the cannabis because he did not know that the bag contained the cannabis. The defence has, therefore, failed in rebutting the prosecution case and in raising a reasonable doubt in the prosecution case that he did not know that the bag contained the cannabis, that he did not have mens rea possession of the cannabis, that the cannabis belonged to him, that he had no intention to deal with the cannabis and that he was not trafficking in the cannabis at the material time.

[93] At the conclusion of the defence, the court was convinced that the prosecution had succeeded in proving the charge against the accused beyond all reasonable doubt.

CONCLUSION

[94] The court, consequently, found the accused guilty as charged, convicted him and duly sentenced him to death pursuant to the mandatory death penalty as prescribed in s 39B(2) of the DDA.

Accused found guilty as charged and sentenced to death.

Reported by Kanesh Sundrum